82-1863

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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO.

NICHOLAS SILANO, Petitioner

V.

UNITED STATES, Respondent.

APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3d day of February, one thousand nine hundred and eighty three.

Present:
HONORABLE WILLFRED FEINBERG
Chief Judge

HONORABLE AMALYA L. KEARSE
Circuit Judge

HONORABLE EDWARD D. RE*
Chief Judge, United States Court of International Trade

UNITED STATES OF AMERICA
Appellee,

against 82-1326

Nicholas Silano and 82-1328
Joseph W. Frank,
Appellants.

Appeal from the United States

District Court for the Eastern District

*Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be an it hereby is AFFIRMED.

1. Appellants claim that the trial court erred in not dismissing the indictment on speedy trial grounds. Appellant Frank does not appear to have made a speedy trial motion below; If so, he waived his right to make this argument on appeal. In any event, the claim is without merit. We are bound by United States v. Mejias, 552 F.2d 435 (2d Cir.), cert.

denied, 434 U.S. 837 (1977), a case not substantially distinguishable from this one. The district court did not err in determining that this case involved a state, rather than federal, arrest for speedy trial purposes.

2. Appellants' contention that the court erred in not granting a continuance so they could obtain trial testimony from the state trial is without merit. The "granting or denial of a continuance lies within the sound discretion of the trial court", United States v. Taylor, 562 F.2d 1345, 1363 (2d Cir.), cert. denied, 432 U.S. 909 (1977), and the court here did not err in refusing to grant a continuance where appellants had ample time prior to the trial to secure the materials sought and failed to do so.

3. Appellants' claim with respect

to double jeopardy violations and alleged violations of the Justice Department's Petite policy are wholly without merit. A federal prosecution following a state prosecution for substantially the same offense does not violate a defendant's protection against double jeopardy. In addition, putting to one side whether a violation of Department of Justice policy would entitle a defendant to relief in the the first instance, in the case before us the United States Attorney, in fact, both sought from the Department of Justice and was granted permission to prosecute applellants.

4. Appellant Frank argues that there was insufficient credible evidence upon which to convict him. However, appellant bears a very heavy burden on such a claim, and issues of credibility are ex-

clusively within the province of the jury. See United States v Losada, 674 F.2d 167, 173 (2d Cir.) cert. denied, 102 S. Ct 2945 (1982). In this case, taking the view most favorable to the government, there is substantial evidence supporting appellant's conviction. Appellant points to the state court judge's determination that certain of the government witnesses' testimony was "totally unworthy of belief", People v Grillo, No. 2202/81, slip op. at 5 (Suffolk County Ct. May 6, 1982). But that comment was made with regard to another defendant by the state judge as the trier of fact. In the case before us, the jury was the trier of fact and may well have weighed the credibility of the witnesses differently with respect to this appellant. Moreover, as the court below held, the jury could have believed other

aspects of the challenged testimony connecting applellant with the large scale smuggling operation taking place around him.

5. Appellant Frank's contention that it was error to admit evidence of guns in his possession is without merit. Proof of possession of weapons is admissible in a narcotics conspiracy case as indicative of "tools of the trade". See United States v Barnes, 604 F.2d 121, 166-67 (2d Cir. 1979), cert denied, 446 US 907 (1980). In addition, proof of weapons possession by appellant corroborated the police officer's testimony with respect to his identification of appellant as a participant in the unloading of the drugs.

6. We have considered all of appel- lants' contentions and find them to be without merit.

WILFRED FEINBER,
Chief Judge

AMALYA L. KEARS, Circuit Judge

EDWARD D. RE, Chief Judge,
United States Court of
International Trade

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwes used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twelfth day of April, one thousand nine hundred and eighty-three.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. Nos. 82-1326

JOSEPH WILLIAM FRANK and 82-1328

NICHOLAS SILANO,

Defendants-Appellants.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herby counsel for

the defendants-appellants, Joseph William Frank and Nicholas Silano,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by

Francis X. Gindhart,

Chief Deputy Clerk